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No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE URBAN MORGAN INSTITUTE FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER REGARDING THE *CHARMING BETSY* CANON

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News Transcript, United States Department of Defense, Briefing on Geneva Convention, EPW's and War Crimes 1 (April 7, 2003), at http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html 15-16

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Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048 (2005) 22

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William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) 11

David Glazier, Note, *Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005 (2003) 23

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INTEREST OF *AMICUS CURIAE*[1]

The Urban Morgan Institute for Human Rights, *amicus curiae*, respectfully submits this brief in support of Petitioner, Salim Ahmed Hamdan. The Urban Morgan Institute for Human Rights was founded in 1979 at the University of Cincinnati College of Law. The Institute edits the Human Rights Quarterly, a scholarly journal published by The Johns Hopkins University Press, and sponsors Pennsylvania Studies in Human Rights, a book series published by the University of Pennsylvania Press. The Institute is devoted to the study of international human rights law and is thus particularly well suited to express an informed view on the construction of acts of Congress against the backdrop of international law.

SUMMARY OF ARGUMENT

This Court should reject the government's contention that 10 U.S.C. § 821 and the Authorization to Use Military Force (AUMF) authorize Mr. Hamdan's trial by a special military commission. Federal law should be construed where possible to avoid a conflict with international law and Congress did not clearly authorize persons like Mr. Hamdan to be tried by military commissions in violation of the Geneva Conventions.

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[1] Counsel for the parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for any party to the litigation authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or counsel made any monetary contribution to the preparation or submission of this brief.

A long-established and largely uncontroversial canon of statutory interpretation—the "*Charming Betsy*" canon—provides that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Other briefing before the Court amply demonstrates—and we therefore do not reiterate—that it would violate international law, including core provisions of the Geneva Conventions of 1949, to try Mr. Hamdan in the military commission the government established. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316.

Application of the *Charming Betsy* canon to this case will promote core constitutional and public policy values. First, applying the canon here will advance fundamental separation-of-powers principles—the Framers conferred on *Congress*, not the President, primary authority over the extent and manner of U.S. compliance with international law. Second, applying the *Charming Betsy* canon in this case would be consistent with the Executive Branch's own public commitment to follow the very international legal norms at issue in the case. And third, applying the *Charming Betsy* canon here would give effect to the will of a supermajority of the Senate, which gave its formal advice and consent in ratifying the Geneva Conventions.

Nothing in Section 821 or the AUMF provides any justification for overriding the *Charming Betsy* presumption. Far from authorizing the use of a military commission where that would violate international law, Section 821 provides that military commissions have concurrent jurisdiction with courts-martial with respect to offenses "that by statute or by the law of war may be tried by military commission." Thus,

Section 821 references international law—"the law of war"—and provides for trial by a military commission in cases *when international law permits* trials in that tribunal. The AUMF, which authorizes the use of force against persons involved in the September 11 terrorist attacks, says nothing about trials by military commissions. It does not come close to meeting *Charming Betsy*'s requirement of an affirmative expression of congressional intent to authorize violations of international law.

ARGUMENT

I. THE *CHARMING BETSY* CANON ESTABLISHES A STRONG PRESUMPTION AGAINST INTERPRETATIONS OF FEDERAL LAW THAT WOULD VIOLATE INTERNATIONAL LAW.

The *Charming Betsy* canon derives its name from Chief Justice Marshall's 1804 opinion for a unanimous Court in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The question there was whether the schooner's owner had violated the Nonintercourse Act of 1800 prohibiting trade with France during our undeclared war with that nation. The Act applied to "any person or persons resident within the United States or under their protection." Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800). The Charming Betsy's owner argued in part that applying the Act to him, as a Danish citizen, would violate "rights of neutrality" under international law. 6 U.S. at 107. The Court reasoned that "an act of congress ought never to be construed to violate the law of nations, if any other possible

construction remains" and agreed with the owner that the Act did not apply to him. *Id.* at 118.[2]

Charming Betsy's commonsensical presumption, this Court has explained, is required out of respect for Congress.[3] In *Heong v. United States*, 112 U.S. 536 (1884), the Court construed a federal law restricting Chinese immigration not to override a treaty with China that accorded a right of re-entry to laborers previously residing in the United States. The Court wrote:

> [I]t would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations [of the United States' international obligations] were present in the minds of [Congress's] members when the legislation in question was enacted.

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[2] Notably, even *Charming Betsy* does not appear to have been the Court's first application of this principle. In *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801), Chief Justice Marshall wrote that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations." *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 486 (1998). In later cases, too, the Court has applied this canon of construction without specifically citing *The Charming Betsy*. *See, e.g., Heong v. United States*, 112 U.S. 536 (1884).

[3] In a similar vein, Professor Bradley has suggested that the canon can be understood as reinforcing the constitutional separation of powers. *See generally* Bradley, *The* Charming Betsy *Canon and Separation of Powers*, 86 Geo. L.J. 479.

Id. at 540.

Consistent with this "respect for the intelligence and patriotism" of Congress, this Court looks for an "affirmative expression of congressional intent" before it construes a statute to conflict with the international obligations of the United States. *E.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (construing a federal statute prohibiting employment discrimination not to apply on U.S. military bases in the Philippines so as to avoid conflict with an international agreement concluded by the President that mandated preferential employment of Filipinos at those facilities); *F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (employing the canon as an aid in discerning Congress's intent that the Sherman Act should not apply to foreign plaintiffs complaining of foreign adverse economic effects).[4]

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[4] The *Charming Betsy* canon's basic presumption that Congress legislates with knowledge of the relevant legal landscape finds support in two other interpretive canons. First, courts require a clear statement by Congress before concluding that a subsequent statute has "abrogated or modified" a treaty (like the Geneva Conventions). *E.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Second, courts also assume that Congress did not intend to repeal domestic law by implication. *See, e.g., United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976); *see also Heong*, 112 U.S. at 549-50 (comparing the presumption against repeal of domestic law by implication to the presumption against assuming Congress has intended to violate the terms of a treaty). This Court has applied this canon to avoid an interpretation that would permit the "evasion" of a prior act of Congress, reasoning that "[b]oth types of 'repeal'—effective and actual—involve the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended." *United*

This Court and the lower courts have employed the *Charming Betsy* canon in interpreting a broad range of federal laws. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (using the canon to interpret the National Labor Relations Act); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (Jones Act); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (Immigration and Nationality Act); *George E. Warren Corp., v. E.P.A.*, 159 F.3d 616, 624 (D.C. Cir. 1998) (Clean Air Act); *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988) (smuggling statutes). Moreover, the *Charming Betsy* canon is triggered by all the various sources of international law. In *Charming Betsy* itself and the *F. Hoffman-La Roche* case, for example, the Court relied upon the canon to avoid conflicts with customary international law, while *Heong* invoked the canon to avoid potential conflict with a treaty. The *Weinberger* case applied the canon to avoid a conflict with an executive agreement, even though that agreement had not received the approval of the Senate constitutionally required for treaties. *Weinberger* thus confirms that even non-self-executing treaties, which (like executive agreements) are not directly enforceable in domestic courts absent implementing

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Cont'l Tuna Corp., 425 U.S. at 169. For exactly the same reason, this Court should require clear language from Congress before concluding that the President has been authorized to act contrary to international law, and particularly contrary to those provisions of the Geneva Conventions that have been incorporated into domestic law. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 549-50 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (describing Army Regulation 190-8, which was adopted to implement part of the Geneva Conventions); Army Regulation 190-8: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, *available at* http://www.apd.army.mil/pdffiles/r190_8.pdf.

legislation, can provide the basis for application of the canon. Thus, in this case the Court can apply the *Charming Betsy* canon without deciding whether the Geneva Conventions are self-executing or enforceable by individuals.

Examples of the lower courts applying the *Charming Betsy* canon are too numerous to catalog exhaustively here, but there can be no question that the canon has been widely invoked by leading jurists both contemporary and historical. *See, e.g., United States v. Hensel*, 699 F.2d 18, 26-27 (1st Cir. 1983) (Breyer, J.) (explaining that, in enacting a statute authorizing Coast Guard searches, Congress had clearly intended that the *Charming Betsy* canon would apply); *United States v. Aluminum Corp. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (Hand, J.) (reasoning that Congress intended the courts "not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers"); *South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987) ("Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States 'to violate the law of nations.'") (quoting *The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) at 118.); *In re Rath*, 402 F.3d 1207, 1211-12 (Fed. Cir. 2005) (overcoming the *Charming Betsy* presumption where the statute and legislative history were clear that Congress did not intend to fully incorporate an international convention on trademarks). Moreover, in addition to its articulation by the courts, the *Charming Betsy* doctrine has long been canonized in the American Law Institute's *Restatements of Foreign Relations*. The *Second Restatement*, published in 1965, stated: "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a

court in the United States will interpret it in a manner that is consistent with international law." Restatement (Second) of the Foreign Relations Law of the United States § 3(3) (1965). Similarly, the 1987 *Third Restatement* provides that wherever "fairly possible," courts will construe statutes or acts of Congress "so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987).

Finally, although this Court's recent ruling on related issues in *Hamdi v. Rumsfeld* did not cite the *Charming Betsy* decision, its analysis in that case mirrored the canon's application. In *Hamdi*, one aspect of the plurality opinion rejected the Government's claim that the AUMF authorized "indefinite detention" of enemy combatants, 542 U.S. at 519 (O'Connor, J. plurality opinion), a conclusion joined by all of the Justices with the exception of Justice Thomas. *Id.* at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg); *id.* at 573-76 (Scalia, J., dissenting, joined by Justice Stevens). The plurality reasoned that the AUMF (upon which the Government relies in this litigation as well) could not reasonably be read as authorization for indefinite detention *because* "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id.* at 520 (citing, *inter alia*, Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War). Justice Souter, joined by Justice Ginsburg, agreed with the plurality that potential violations of international law made it impossible to credit the Administration's broad reading of the AUMF. *See id.* at 547-51. In *Hamdi*, the Court thus rebuffed the Administration's proffered interpretations of the AUMF precisely *because* those constructions would have created a conflict between U.S. and

international law.[5] That is the essence of the *Charming Betsy* doctrine that *amicus* urges this Court to apply in this case.

In short, the well-established *Charming Betsy* canon reflects the presumption—unchallenged in this litigation—that Congress generally intends to keep the United States in compliance with the nation's international obligations. *Amicus* submits that application of this principle compels the conclusion that Congress has not authorized any treatment of Mr. Hamdan that violates the Geneva Conventions.

II. APPLYING THE *CHARMING BETSY* CANON IN THIS CASE WILL ADVANCE CORE CONSTITUTIONAL AND PUBLIC POLICY VALUES.

The justifications for applying the *Charming Betsy* canon are particularly strong in this case. First, the doctrine will advance separation-of-powers principles—the Framers conferred on *Congress*, not the President, primary authority over the extent and manner of U.S. compliance with international law, particularly in wartime. Second, the Executive Branch's own repeated commitments to follow the

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[5] Accordingly, *Hamdi* weighs heavily against the D.C. Circuit's suggestion that the President's construction of the United States' obligations under international law is dispositive of the question whether a conflict exists. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005). The President has no more authority to "construe" away conflicts between the AUMF and international law here than in *Hamdi*. Indeed, ceding the President such authority would fundamentally undermine the *Charming Betsy* doctrine, which presumes congressional familiarity with international law, not with a presidential "construction" of that law developed during litigation. *See also* pp. 13-15, *infra* (explaining that *Charming Betsy* has been applied repeatedly to defeat the Executive Branch's interpretation of a statute).

international legal norms at issue in this case make application of the canon especially appropriate. And third, applying the *Charming Betsy* canon here will give effect to the will of a supermajority of the Senate.

A. Separation of Powers

The grounds for construing the AUMF and 10 U.S.C. § 821 to avoid violations of international law are stronger here than in most statutory interpretation cases because the text of the Constitution vests Congress—not the President—with substantial authority over core issues of international law involving war. Moreover, to the extent that there remains any ambiguity regarding congressional intent, it is the President—not individuals like Mr. Hamdan—who has the greater capacity to influence Congress's agenda and to seek explicit authorization for his actions.

Article I of the Constitution grants Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art. I, § 8, cl. 11. At the time of the framing, all three of these powers relating to the conduct of war were defined terms at international law. By vesting these powers in Congress, the Framers deliberately placed core questions of international law relating to the conduct of war under the control of Congress rather than the President. *See, e.g.*, Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. Davis L. Rev. 321, 336-57 (2003) (describing the meaning of "declare war" in eighteenth-century international law); Francis Wharton, *Commentaries on Law* §§ 216-18, 455 (1884) (describing international law governing the right of capture and noting that the Constitution vests Congress with the power to authorize captures); David Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 Brooklyn L. Rev. 1083, 1173 (1992)

(describing letters of marque and reprisal and noting that although under British precedent it was the executive who issued such letters, the U.S. Constitution expressly lodges this authority with Congress).

The Framers thus made a deliberate judgment that in this context Congress, not the Executive, would have primary responsibility to determine the extent and manner of U.S. compliance with international law. The *Charming Betsy* canon's strong presumption against interpretations of federal statutes that would permit violations of international law helps to effectuate that judgment. The canon sensibly limits congressional authorizations of non-compliance with international law to those circumstances where Congress has specifically authorized the violation.

Requiring explicit congressional authorization for violations of international law also serves separation of powers principles because the Executive has the best chance of securing legislation from Congress to correct interpretations by the courts with which the Executive disagrees. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2174 (2002) (*citing* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 334-36, 338-40, 344-45, 397 (1991)). Certainly the array of legislation enacted following the September 11 attacks provides strong evidence of the President's power to control the legislative agenda in times of war. *See, e.g.*, A. Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002) (describing the Senate's suspension of its normal operating procedures in the days after September 11 in order to expedite the President's requests); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J.

1259, 1276-77 (2002) (noting that after September 11, Congress managed "[i]n record time" to "consider[] and enact[] a broad array of laws, many of them in almost precisely the form sought by the President") (footnote omitted). The *Charming Betsy* doctrine also serves separation of powers values by providing a bright-line rule against which Congress can make future authorizations and against which the President can take action. *Cf. Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules.").[6]

In a relatively recent case, the Ninth Circuit questioned in *dicta* whether the *Charming Betsy* canon should be applied against the Executive Branch. *See United States v. Corey*, 232 F.3d 1166, 1177-79 (9th Cir. 2000). *Corey* addressed the applicability of a federal criminal statute to conduct in a foreign country. The criminal defendant in that case argued that applying the statute to his conduct would violate customary international law governing extraterritorial application of statutes, and that under the *Charming Betsy*

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[6] Notably, the *Charming Betsy* canon's limited field of operation also helps to preserve the separation of powers. The canon does not apply if constitutional text puts the power in question squarely in the President's hands (under the Commander-in-Chief clause, for example) because in that context the scope of authorization by Congress is irrelevant. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, . . . must stem *either* from an act of Congress *or* from the Constitution itself.") (emphasis added). Nor does the canon apply if Congress has explicitly authorized the President to take the action in question. In other words, the canon matters only to the extent that the President's authority depends upon congressional authorization and that the scope of such authorization is itself unclear.

canon the court should accordingly refuse this interpretation. The panel rejected this argument on the ground that the concurrent jurisdiction did not violate international law. *See id.* at 1179. In *dicta*, however, the court said that the concerns underlying the *Charming Betsy* canon "are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government" and that "we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.* at 1179 n.9.

This *dicta* from *Corey* is entirely incorrect. The opinion stated, for example, that this Court had never invoked the canon against the Executive Branch in a case to which it was a party. That is wrong: In 1913, the Court ruled against the Executive Branch in *MacLeod v. United States*, 229 U.S. 416 (1913), a case involving the collection of duties in occupied territory. The Executive Branch claimed that a subsequent act of Congress had ratified the collection of duties by a military collector of customs in Manila, but the Court disagreed, reasoning that "it should not be assumed that Congress proposed to violate the obligations of this country to other nations."[7] 229 U.S. at 434. Lower courts, even including the Ninth Circuit itself, have also used the canon to

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[7] The Supreme Court has also relied upon the presumptions against implied repeal of a treaty and against extraterritorial application of statutes—*see* n.4, *supra*—to reject interpretations of federal statutes proffered by the executive branch in cases in which it is a named party. *See, e.g., United States v. Payne*, 264 U.S. 446 (1924). Similarly, the Court has applied the presumption against extraterritorial application of U.S. law to defeat an agency's interpretation of a statute. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

defeat the Executive Branch's interpretation of a statute. *See Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004); *Yusuf Ali v. Ashcroft*, 346 F.3d 873, 885-86 (9th Cir. 2003); *Kim Ho Ma*, 257 F.3d at 1114; *Commodities Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493-95 (D.C. Cir. 1984); *United States v. Laden*, 92 F. Supp. 2d 189, 214-15 (S.D.N.Y. 2000); *see also* Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. Rev. 293, 338-46 (2005) (detailing the use of the canon contrary to the position of the Executive Branch).[8] These cases demonstrate the courts' insistence that *Congress* make clear its intention to violate international law, even where the Executive Branch has made its position clear.

Equally as troubling as the factual inaccuracy of the Ninth Circuit's opinion, the court also misapprehended the fundamental purpose of the *Charming Betsy* canon. It is true that, in the broadest terms, the *Charming Betsy* canon is about reducing the risk of unwarranted international tension. But as this Court has explained, *see Heong*, 112 U.S. at 540, the canon is more specifically about respecting Congress's prerogative to legislate. The point of the canon is *not* for the court to consider which interpretation of a statute might cause the fewest foreign policy complications—an approach that might, as the Ninth Circuit suggested, render *Charming Betsy* less relevant where the Executive Branch had already considered those consequences. Rather, the *Charming Betsy* canon is a way to determine what *Congress* has authorized by statute, and the President's opinion of the foreign policy

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[8] To be sure, various agencies litigate on behalf of the Executive, but nothing in these cases suggests that courts should differentiate among agencies when applying the *Charming Betsy* canon to construe a statute.

ramifications of any particular statutory interpretation, however well or poorly considered, is irrelevant to that determination.

B. The Executive Branch's Long-Standing Commitment to Abide by International Humanitarian Law

In this case, the Executive Branch's own consistent, publicly avowed commitment to follow international law provides a further reason to apply the *Charming Betsy* doctrine. It is unlikely that Congress would have intended to authorize violations of the very international norms that the Executive Branch has pledged to uphold.

The Executive Branch has consistently reiterated its commitment to follow the law of war, both customary and treaty-based. From the famous blockade ordered by President Lincoln at the outset of the Civil War that generated *The Prize Cases*, to the seizure of Cuban fishing vessels during the Spanish-American war, to the military trials of World War II, to U.S. conduct in the Persian Gulf war, American Presidents have repeatedly made explicit their desire to comport with the law of war. *See* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. Int'l L. & Pol. 363, 378-94 (2003); Colonel James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance With the Rule of Law*, 41 Naval L. Rev. 83 (1993). Today, the Bush administration continues to defend its treatment of detainees around the world as consistent with international law.[9]

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[9] News Transcript, United States Department of Defense, Briefing on Geneva Convention, EPW's and War Crimes 1 (April 7, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html ("Let me talk a little bit about

Indeed, the Department of Defense requires *all branches* of the armed forces to comply with the law of war in conducting military operations and related activities. *See* Department of Defense Directive, DoD Law of War Program, No. 5100.77 (Dec. 9, 1998), *available at* http://www.dtic.mil/whs/directives/corres/pdf2/d510077p.pdf.

The Executive Branch has also explicitly committed itself to the Geneva Conventions. Specifically with respect to detainees at Guantanamo like Mr. Hamdan, the Department of Defense has publicly maintained that their treatment comports with the Geneva Conventions. *See* News Transcript, United States Department of Defense, Briefing on Detainee Operations at Guantanamo Bay (February 13, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html. Although the Bush Administration has made controversial decisions about the *scope* of the Geneva Conventions,[10] it has not denounced or

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[Department of Defense] policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations.") (statement of W. Hays Parks, Special Assistant to the Army Judge Advocate General).

[10] *See, e.g.*, Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 9, 2002) (concluding that the Geneva Conventions do not apply to detainees from the war in Afghanistan), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek/.

repudiated them, but rather has repeatedly reaffirmed its intention to comply with them.

The Executive Branch's commitment to comply with the Geneva Conventions is also reflected in the Army Regulations themselves:

> All persons taken into custody by U.S. forces will be provided with the protections of the [Geneva Convention Relative to the Treatment of Prisoners of War] until some other legal status is determined by competent authority.

Army Regulation 190-8 § 1-5(a)(2). The purpose of army regulation 190-8 was to implement customary international law as well as the Geneva Conventions. Army Regulation 190-8 § 1-1(b). *See also Hamdi*, 542 U.S. at 549-51 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg) (noting that these regulations were adopted to implement the Geneva Conventions). Regulation 190-8 itself provides that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." Army Regulation 190-8 § 1-1(b)(4). The consistent commitment by the Executive Branch to comply with international law, and specifically with the Geneva Conventions, reinforces the *Charming Betsy* presumption that general authorizations by Congress, such as the AUMF and 10 U.S.C. § 821, extend only to those actions that do not violate international law.

C. The Geneva Conventions Have Received the Advice and Consent of a Supermajority of the Senate

The Geneva Conventions provide a robust basis for applying the *Charming Betsy* presumption for another reason: they reflect limitations on government conduct to which the Senate has already given its formal advice and consent via the constitutionally required supermajority vote. U.S. Const. art. II. The Senate's ratification of these treaties means that the Senate itself (as well as the President) has previously considered and approved the Geneva Conventions' limitations on the use of force. Moreover, the Senate has considered the issue in the same context in which it arises in this case: defining and limiting the actions that the U.S. military is permitted to take. Because the *Charming Betsy* canon is based on the presumed intent of Congress, it applies particularly well here, where a supermajority of the Senate has already specifically approved the limitations imposed by international law.

III. THE AUMF'S GENERAL AUTHORIZATION FOR USE OF MILITARY FORCE DOES NOT AUTHORIZE THE PRESIDENT TO ESTABLISH MILITARY COMMISSIONS IN VIOLATION OF INTERNATIONAL LAW.

The AUMF provides, in pertinent part:

> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to

> prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40 (S.J. Res. 23), § 2, 115 Stat. 224 (Sept. 18, 2001). Significantly, this general language says nothing at all about detentions or trials by military commission, and certainly does not meet *Charming Besty*'s requirement of "affirmative expression of congressional intent" to authorize violations of international law. *See Weinberger*, 456 U.S. at 32. As other briefing before this Court amply demonstrates, however, the commission convened to try Mr. Hamdan *does* violate numerous aspects of international law, including core provisions of the Geneva Conventions of 1949. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316. This Court should therefore apply the *Charming Betsy* canon, and reject the government's urging to construe the generalized text of the AUMF as sanctioning such international law violations.

Moreover, nothing in the legislative history of the AUMF provides any basis to conclude that Congress intended to authorize the President to violate international law. To the contrary, comments by members of the House confirm that Congress expressly contemplated that the scope of the AUMF would be limited by international law. *See, e.g.*, 147 Cong. Rec. H5638, H5653 (daily ed. Sept. 14, 2001) (statement of Rep. Clayton) (noting that Congress would monitor the President's use of force to make sure it is "in accordance with international laws"); *id.* at H5675 (statement of Rep. Jackson) ("we must [] affirm the principles that came under attack on September 11—respect for innocent life and international law.").

The D.C. Circuit's decision below failed even to address the implications of *Charming Betsy* for the AUMF. Instead, the court invoked this Court's rulings in *In re Yamashita*, 327 U.S. 1 (1946), and *Ex Parte Quirin*, 317 U.S. 1 (1942). Those cases did not, however, interpret the general declarations of war as authorizing military commissions, but instead relied on the narrow, more explicit grants of authority in the Articles of War. *See Yamashita*, 327 U.S. at 7 *and Quirin*, 317 U.S. at 27 (both primarily addressing Article 15); *see also* Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 Nw. U. L. Rev. 1567, 1575-80 (2004). *Quirin* and *Yamashita* thus actually *undermine* the government's argument that the general authorization for the use of force in the AUMF includes authorization for military commissions. Moreover, as discussed below, in both cases the Court was careful to conclude that the military commissions in question complied with international law, and therefore the two cases provide no support for the argument that the AUMF authorizes the President to convene military commissions in violation of international law.

This Court's recent decision in *Hamdi* further supports reading the AUMF consistent with international law. As set forth *supra* at 8-9 and n.6, the plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, reasoned that the AUMF did *not* authorize "indefinite detention," 542 U.S. at 519 (O'Connor, J., plurality opinion), a conclusion joined by all of the Justices with the exception of Justice Thomas. *See id.* at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg); *id.* at 573-76 (Scalia, J., dissenting, joined by Justice Stevens). The plurality found that the AUMF did not authorize such detention because it would be contrary to the law of war, and

cited Article 118 of the Third Geneva Convention in support. *Id.* at 520. For precisely the same reason, this Court should hold that the AUMF does not authorize trials by military commissions or detentions that violate international law, including the Geneva Conventions.

IV. SECTION 821 DOES NOT AUTHORIZE THE PRESIDENT TO ESTABLISH MILITARY COMMISSIONS IN VIOLATION OF INTERNATIONAL LAW.

Charming Besty's presumption also undermines the government's reliance on 10 U.S.C. § 821, the federal statute that purportedly authorizes the military commissions at issue in this case. Indeed, the express language of section 821 demonstrates that Congress did not intend to authorize the President to establish military commissions in violation of international law.

Section 821 provides that the jurisdiction of courts-martial does not deprive "military commissions" of "concurrent jurisdiction with respect to offenders or offenses that by statute or by the *law of war* may be tried by military commission." 10 U.S.C § 821 (emphasis added). While the *Charming Betsy* canon applies even to statutes that make no mention of international law, the text of section 821 itself limits the use of military commissions to those permitted under the "law of war." Applied to section 821, therefore, the presumption that "Congress did not intend an application that would violate principles of international law" is not just "fairly inferred," but explicitly rendered. *See Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968).

The D.C. Circuit relied on *In re Yamashita*, 327 U.S. at 19-20, and *Ex Parte Quirin*, 317 U.S. at 29-36, to conclude

that section 821 *does* authorize the military commission challenged in this case. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005). Once again, however, the lower court failed to recognize the relevance of the *Charming Betsy* canon. While section 821 plainly authorizes military commissions in general, neither of the cases cited by the D.C. Circuit even addresses the question whether Congress intended section 821 to authorize the use of military commissions in violation of international law. To the extent that the plain text of section 821 leaves any doubt on that score—and we believe the statute itself answers the question in the negative—the *Charming Betsy* canon reinforces the conclusion that Congress intended no such thing.

Significantly, to the extent that the cases upon which the D.C. Circuit relied are relevant here, they only confirm that section 821 does *not* empower the President to violate international law. In both *Ex Parte Quirin*, 317 U.S. at 29-36, and *In re Yamashita*, 327 U.S. at 14-17, the Court interpreted predecessor provisions to 10 U.S.C. § 821. And in both cases, the Court carefully scrutinized whether the alleged conduct violated the law of war before upholding the use of military commissions. *See also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2132 (2005) (reasoning that the President's statutory authority to use military commissions is "probably limited by international law"). In *Yamishita*, the petitioner alleged that his trial by military commission for offenses committed while he was a combatant violated certain protections afforded by the Geneva Convention of 1929, a precursor to the 1949 Geneva Conventions. 327 U.S. at 20-23. The Court carefully reviewed the 1929 Convention before concluding that the relevant protections applied only to trials for offenses committed during detention as a prisoner of war, not to trials

for offenses committed during combat. *Id.*[11] If the President had the authority under 10 U.S.C. § 821 to convene military commissions with procedures that violate international law, this discussion would have been entirely unnecessary. *See also* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wisc. L. Rev. 309, 327-29 (2003) (noting that in *Ex Parte Quirin* the Supreme Court independently determined whether the charges against the Nazi saboteurs constituted offenses against the law of war cognizable by a military tribunal).[12]

In short, the Supreme Court's opinions in *Quirin* and *Yamashita* only confirm what is already clear from the text of section 821 and the application of the *Charming Betsy* canon: the statute does not authorize the President to convene military commissions in violation of international law.

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[11] The 1949 Geneva Conventions extended these protections to cover trials for offenses committed during combat. *See* David Glazier, Note, *Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2079-80 (2003).

[12] The D.C. Circuit's reference to 10 U.S.C. § 836, *see Hamdan*, 415 F.3d at 38, likewise does not support the conclusion that Congress authorized military commissions in violation of international law. Section 836 provides that the President may establish *procedures* for military commissions, but it does not in any way suggest that Congress approved procedures inconsistent with international law. In light of the *Charming Betsy* canon, this Court should not read such authorization into the statute.

V. APPLYING THE *CHARMING BETSY* CANON WOULD SIMPLIFY THE ISSUES BEFORE THIS COURT.

The government's contention that Congress has authorized Mr. Hamdan's trial by military commission lies at the heart of its case here. The *Charming Betsy* canon speaks directly to that issue, establishing that Congress intended its authorization to extend only to treatment of defendants that *complies* with the United States' obligations under international law. Applying the *Charming Betsy* canon in this case would allow this Court to avoid deciding whether the Geneva Conventions are self-executing and whether Mr. Hamdan has any independent ability to press the Conventions as a basis for relief—two issues of concern to the court below. The *Charming Betsy* canon clarifies that the real question here is *not* whether Mr. Hamdan can rely on the Geneva Conventions, but *whether Congress intended to authorize the President to violate them*. Mr. Hamdan plainly has standing to challenge the government's interpretation of the AUMF and section 821, and concluding that Congress did not intend to authorize applications of those enactments that violate international law obviates the need to debate the status of the Conventions themselves.

CONCLUSION

Congressional authorization is central to the government's argument in this case and to the D.C. Circuit's ruling below, yet the *Charming Betsy* canon—a basic rule of statutory interpretation with deep historical roots—shows that Congress has not authorized the President to try Mr. Hamdan by special military commission in violation of international law. Pursuant to the *Charming Betsy* canon, courts presume that Congress does not intend to authorize violations of international law. To the extent that Mr.

Hamdan's trial would violate international law, this Court should conclude that neither the AUMF nor 10 U.S.C § 821 provides authorization for such a trial.

Respectfully Submitted,

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